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No. 07-1440

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In The

Supreme Court of the United States

STEPHEN BIECHER AND
B&B ELECTRICAL CONTRACTORS, INC.,

Petitioners,

v.

STATE ELECTRICAL WORK EXAMINING BOARD,

Respondent.

On Petition For Writ Of Certiorari
To The Connecticut Appellate Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Connecticut Appellate Court correctly determined that the Connecticut General Statutes and Regulations of Connecticut State Agencies authorized the State of Connecticut Electrical Work Examining Board ("Board") to impose civil penalties against an electrician and his electrical company and to revoke that electrician's license to perform electrical work when the Board determined that: (1) the electrician and his company installed old and/or used electrical wire at a State public works project; and (2) the electrician made false, misleading or deceptive representations regarding his work on certified payroll records he submitted to the Connecticut Department of Labor.

LIST OF PARTIES

Petitioners: Stephen Beecher,
B&B Electrical Contractors, Inc.

Respondent: State of Connecticut Electrical Work Examining Board

The sole respondent to this petition is the "State Electrical Work Examining Board." The caption of the petition for a writ of certiorari erroneously names the respondents as "Commissioner of the Department of Consumer Protection for Connecticut, Edwin Rodriguez, et al." The Court's docket, on the other hand, lists the respondents as "Jerry Farrell, Jr., Commissioner, Department of Consumer Protection for Connecticut, et al." None of these individuals were parties to the decision below. Rather, as is clear from the caption and text of the decisions the petitioners have asked this Court to review, *see* appendix to petitioners' writ, the State Electrical Work Board was the sole defendant in the proceedings below and is, therefore, the proper respondent to the present petition.

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COUNTER-STATEMENT OF THE CASE

This case involves an administrative appeal from two separate decisions and orders rendered by the State of Connecticut Electrical Examining Board ("Board") on February 18, 2005. In those decisions, the Board found that, while working as a subcontractor on a state construction project at a vocational school (hereinafter, "Bullard Havens") in Bridgeport, Connecticut, Stephen Beecher and his company, B&B Electrical Contractors, Inc. (the "Petitioners"), violated numerous provisions of the Connecticut General Statutes and the regulations of the Connecticut Department of Consumer Protection ("DCP") pertaining to electricians.

The Board reached its decisions after a lengthy, independent investigation by DCP. That investigation was prompted by a third-party's claim that B&B Electrical Contractors, Inc. ("B&B") and its President, Stephen Beecher ("Beecher"), had, in violation of contract specifications and generally accepted basic trade practices, installed old, used electrical wire at Bullard Havens. While investigating this initial claim, the Board also discovered that the Petitioners had: (1) permitted unlicensed, unregistered workers to perform electrical work at Bullard Havens; (2) permitted apprentices to perform electrical work at that site without proper supervision; and (3) made false, misleading or deceptive representations regarding the work performed at that site.

During the course of this investigation, and before commencing administrative proceedings before the Board, DCP invited the Petitioners and

their attorney to a number of meetings during which they were given notice of the possibility of administrative sanctions and were afforded an opportunity to show that they were in compliance with all state statutes and regulations governing the performance of electrical work.

Thereafter, on April 15, 2004, DCP commenced administrative proceedings against the Petitioners by filing administrative complaints against both of them with the Board. The first administrative hearing took place on May 14, 2004. Additional administrative hearings were held before the Board on: June 10, 2004, July 15, 2004, September 8, 2004, and September 29, 2004. Both of the Petitioners received proper notice of all such hearings and participated, through counsel.

On February 18, 2005, the Board issued the final decisions and orders that form the basis of the instant administrative appeals. In the Beecher final decision and order (the "Beecher Order"), the Board found that Beecher performed and/or caused to be performed work in an incompetent or negligent manner by failing to install new and/or unused electrical wiring at Bullard Havens. As a result of this particular conduct, the Board: (a) ordered Beecher to immediately discontinue the practice of violating state statutes and agency regulations; (b) revoked Beecher's E-1 Electrical License; and (c) fined Beecher a total of $3,000.00.

In addition to its findings concerning the installation of old and/or used electrical wiring at Bullard Havens, the Board also found that Beecher: (a) caused electrical work to be performed by a

person or persons who were improperly licensed and/or not licensed or registered in accordance with Chapter 393 of the Connecticut General Statutes on the job site located at Bullard Havens; (b) permitted an apprentice or apprentices to perform work while not properly supervised at Bullard Havens; (c) misclassified David Beecher, his brother and an apprentice at the time, as an E-2 electrician on certified payrolls for the job site at Bullard Havens; and (d) misclassified Robert M. Williams, an unlicensed and unregistered worker, as a 4th year apprentice on certified payrolls for the job site at Bullard Havens.

As a result of this conduct, the Board ordered Beecher to pay an additional $1,260,500.00 in civil penalties, consisting of: (a) $1,000.00 for engaging in unethical conduct by falsifying certified payrolls; (b) $1,000.00 for failing to pay prevailing wages; (c) $800,500.00 for misclassifying Robert Williams, an unlicensed and unregistered worker, as a 4th year apprentice on certified payroll records (268 violations: first violation at $1,000.00, second violation at $1,500.00, and each subsequent violation at $3,000.00); (d) $317,500.00 for misclassifying David Beecher as an E2 licensed electrician on certified payroll records (107 violations: first violation at $1,000.00, second violation at $1,500.00 and each subsequent violation at $3,000.00); and (e) $140,500.00 for permitting an apprentice or apprentices to perform work while not properly supervised (48 violations: first violation at $1,000.00, second violation at $1,500.00 and each subsequent violation at $3,000.00).

In the B&B final decision and order (the "B&B Order"), the Board found that B&B caused Williams, who was not licensed or registered in accordance with Chapter 393 of the Connecticut General Statutes, to perform electrical work at Bullard Havens. Based on these findings, the Board concluded that B&B was guilty of 268 counts of causing an unlicensed person to perform electrical work, in violation of Conn. Gen. Stat. § 20-341. As a result, it ordered B&B to: (a) immediately discontinue the practice of causing electrical work to be performed by unlicensed or unregistered persons; and (b) pursuant to Conn. Gen. Stat. § 20-341, pay a civil penalty in the amount of $800,500.00 for 268 separate counts of causing electrical work to be performed by a person not licensed or registered in accordance with Chapter 393 of the Connecticut General Statutes. The $800,500.00 civil penalty consisted of $1,000.00 for the first violation, $1,500.00 for the second violation and $3,000.00 for each subsequent violation (266 violations at $3,000.00 per violation).

Subsequently, on March 18, 2005, the Petitioners appealed the Board's orders to the Connecticut Superior Court, claiming that the Board had violated a number of statutory and constitutional provisions in conducting the administrative proceedings and rendering the penalties contained in the orders. In their administrative appeals and briefs to the Superior Court, neither of the Petitioners argued that any federal statutes precluded or preempted the Board from rendering its final decisions and orders. Rather, the Petitioners argued that: (1) Beecher was deprived of notice and an opportunity to show

compliance prior to the institution of agency proceedings in violation of Conn. Gen. Stat. § 4-182(c); (2) the Board exceeded its statutory authority by relying on settlement agreements and/or administrative findings unrelated to the licensing statutes for which the Board has authority to interpret and enforce; (3) the Board erroneously relied on evidence concerning Beecher's misclassification of employees on B&B's certified payroll records when it decided to revoke Beecher's E-1 license because such misclassifications, as a matter of law, do not constitute "false, misleading or deceptive representations regarding his work" under Conn. Gen. Stat. § 20-334(c); and (4) the civil penalties imposed against Beecher for that same conduct were excessive because there was no evidence that those records involved the performance of electrical work or violated the licensing statutes.

On June 16, 2006, the Superior Court issued its Memorandum of Decision ("MOD"). *See Beecher v. State of Connecticut Dept. of Consumer Protection*, Docket No. HHB CV 054004588, 2006 Conn. Super. LEXIS 1936 (Conn. Super. June 20, 2006). In its MOD, the Superior Court rejected each of these claims. With respect to Beecher's claim that he was denied sufficient notice and opportunity to show compliance prior to the time the Department of Consumer Protection instituted agency to revoke his E-1 license, the Superior Court stated that its "examination of the record reveal[ed] that Beecher was given ample notice of the claimed conduct and conditions that could lead to the revocation of his license." *Id.* at *9. The court further held that "even if there was not strict

compliance with General Statutes § 4-182(c), Beecher has not demonstrated that his substantial rights were prejudiced by any such failure. Thus his claim fails." *Id.* at *12. (citing *TeleTech of Connecticut v. DPUC*, 270 Conn. 778, 813-14, 855 A.2d 174 (2004); *Cornelius v. Department of Banking*, 94 Conn. App. 547, 555, 893 A.2d 472 (2006)).

With respect to Beecher's claim that the Board lacked statutory authority to impose civil penalties against Beecher for making false, misleading or deceptive representations regarding his work, the Superior Court held that there was substantial evidence that Beecher, in fact, misclassified B&B employees on certified payroll records and that the Board had the authority to impose fines for each violation. In particular, the court noted that the Plaintiffs cited no authority for a contrary proposition and failed to "engage in any statutory analysis." *Id.* at *14. Noting that courts must afford "deference to the construction given [a] statute by the agency charged with its enforcement," *id.* at *14-15 (citing *MacDermid, Inc. v. Department of Environmental Protection,* 257 Conn. 128, 138, 778 A.2d 7 (2001)), the trial court was "not persuaded that the Board erred in finding Beecher committed violations in the course of his 'work' in the project. . . ." *Id.* at *15. As a result, it rejected Beecher's claim of error.

The Petitioners subsequently appealed the Superior Court's decision to the Connecticut Appellate Court. Once again, in their appeal to the Connecticut Appellate Court, the Petitioners did not argue that any federal statute preempted the

Board from issuing the administrative orders they now ask this Court to review on that basis. In the Appellate Court, the Petitioners argued that: (1) DCP failed to comply with the notice requirements of Conn. Gen. Stat. § 4-182(c); (2) the Board lacked the statutory authority to revoke Beecher's electrical license for making false, misleading or deceptive representations on certified payroll records in violation of Conn. Gen. Stat. § 20-334(c); and (3) the Board exceeded its statutory authority in that it imposed "excessive" civil penalties against Beecher for making false, misleading or deceptive representations on certified payroll records in violation of Conn. Gen. Stat. § 20-334(c).

On December 4, 2007, the Connecticut Appellate Court released its decision in *Beecher v. State Electrical Examining Board*, 104 Conn. App. 655, 934 A.2d 852 (2007). In that decision, the Appellate Court affirmed the Superior Court's decision dismissing the Petitioners' appeal from the Board's administrative orders. In so doing, the Appellate Court constrained its analysis to the issues raised by the Petitioners in their appeal. Specifically, the Appellate Court held that: the Board did not commit reversible error with respect to the Petitioners' rights to notice and an opportunity to show compliance under Conn. Gen. Stat. § 4-182(c); and the Board had the authority under Conn. Gen. Stat. §§ 20-334(c) and 20-341(b) to impose civil penalties against Beecher for making false, misleading or deceptive representations regarding his work on certified payroll records submitted to the Connecticut Department of Labor. *Id.* at 664-667.

Following the Appellate Court's decision, on December 20, 2007, the Petitioners sought review before the Connecticut Supreme Court. In their application for certification to the Connecticut Supreme Court, the Petitioners argued, for the first time, that the Board's administrative orders should be reviewed because they: (1) constituted an impermissible exercise of jurisdiction over prevailing wage laws that are governed by state labor statutes and the Davis Bacon Act, 40 U.S.C. § 276a, *et seq.*; (2) imposed "oppressive" fines by Board members who are peers of the Petitioners in violation of state and federal antitrust laws; and (3) were preempted by federal workplace safety laws, in particular the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. § 651, *et seq.*

The Board opposed that application on the grounds that the Appellate Court's decision did not implicate any federal statutes and that it only involved the application of well-established principles of statutory construction to Connecticut statutes. On February 18, 2008, the Connecticut Supreme Court denied the Petitioners' application for certification to appeal the Appellate Court's decision. *See Beecher v. State Electrical Examining Board*, 285 Conn. 920, 943 A.2d 1100 (2008).

REASONS FOR DENYING THE WRIT

I. THE PETITION ONLY PRESENTS NARROW ISSUES OF THE INTERPRETATION AND CONSTRUCTION OF STATE STATUTES AND DOES NOT IMPLICATE FEDERAL LAWS OR JURISDICTION.

In their Petition for a Writ of Certiorari, as in their briefs and other submissions below, the Petitioners fail to engage in any substantive analysis whatsoever of how or why the "Davis Bacon Act" or "OSHA" preempt the Board from exercising its statutory authority to discipline licensed electricians for misconduct. In the Beecher Order, the Board imposed civil penalties against the Petitioners, not for having violated "wage laws" or "workplace safety standards," but for violating state statutes designed to protect the public from substandard and negligent electrical work.

First, the Board imposed civil penalties against Beecher for making false, misleading and deceptive representations regarding his work. Specifically, the Board penalized him for each instance in which he misclassified the status of electrical workers on certified payroll records that he was required by law to submit to the state contracting agency on a public works project. As the Connecticut Appellate Court noted in its decision, the Board relies on the accuracy of these payroll records to determine whether contractors comply with mandatory work-site ratios on state public works projects, thereby ensuring that electrical work is not performed by unsupervised

apprentices. *See Beecher*, 104 Conn. App. at 663-64. Contrary to the Petitioners' suggestion in their Writ, therefore, the Board did not penalize Beecher for violating "prevailing wage laws" that the Petitioners argue, without any analysis, are governed exclusively by the Davis Bacon Act.

Second, the Board imposed penalties pursuant to state statutes that the Connecticut Appellate Court correctly determined were designed to protect and promote public safety. Specifically, the Appellate Court accepted the Board's argument that the Connecticut General Statutes authorized the Board to penalize licensed electricians for violating state statutes designed, in part "to provide assurance that apprentices perform their work with proper supervision both for their health and safety and for the health and safety of the general public." *Beecher*, 104 Conn. App. at 663-64. In their Writ, the Petitioners bluntly assert, once again with no analysis of the federal statutes involved, that OSHA and/or the Davis Bacon Act preempt the state statutes that the Connecticut Appellate held authorized the Board to act as it did.

It is well-settled, of course, that states have the authority, under their general police powers, to enact laws and regulations designed to protect public health and safety. Indeed, when considering whether a particular state law is preempted by a federal law, this Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act [in question] unless that was the clear and

manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

In order to demonstrate that a state statute is preempted by federal law, a party must show either that: (1) a federal statute specifically provides that it preempts state laws; (2) Congress intended to "occupy the field" in the subject matter about which the state law is concerned; (3) if Congress has not occupied the field, that the state law in question is naturally preempted to the extent of any conflict with a federal statute; (4) it is impossible for a private party to comply with both state and federal law; or (5) under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (citations omitted).

Here, as below, the Petitioners have made no attempt to show that, in enacting the Davis Bacon Act or OSHA, Congress did, or intended to do, any of the things this Court considers when concluding a particular state statutory scheme is preempted by federal law. Nor do they cite a single decision in which this Court, or any others, have held that either the Davis Bacon Act or OSHA preempt a state statutory licensing scheme designed to encourage licensed tradesmen to conduct themselves in a manner that promotes and protects public health and safety. Absent such a showing, there is no reason to grant review before this Court.

II. THE PETITIONERS DID NOT RAISE, AND NO LOWER COURT HAS PASSED UPON, THE ISSUES THE PETITIONERS ARE ASKING THIS COURT TO REVIEW.

Rule 14.1(g)(i) of the Rules of the Supreme Court of the United States provides that, if review of a state-court judgment is sought, the petition shall specify: "when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by the court(s) below; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." *Id.*

In this case, the Petitioners have not, and cannot, comply with Rule 14.1(g)(i) because they did not raise the issue of federal preemption until they sought review before the Connecticut Supreme Court, which under Connecticut practice, is entirely discretionary. As a result, no court has had the opportunity to rule upon the issues the Petitioners are asking this Court to review for the first time. Under these circumstances, the Petitioners cannot show, and do not even attempt to show, as is required by Rule 14.1(g)(i), "that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." *Id.*

CONCLUSION

For all of the reasons set forth herein, the Petitioners' petition for a writ of certiorari should be denied.

Respectfully submitted,

RESPONDENT
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